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# Marvin Petersen and Beverly Petersen v. Voyle Mecham : Brief of Appellant

Utah Supreme Court

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# In The Supreme Court

of the State of Utah

MARVIN PETERSEN and BEVERLY  
PETERSEN, his wife,

*Plaintiffs and Respondents,*

—vs—

VOYL MECHAM,

*Defendant and Appellant:*

Case No.

10,113

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## APPELLANT'S BRIEF

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Appealed from the Third Judicial District Court, in and  
for Salt Lake County—Hon. Stewart M. Hanson, Judge

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POINT II: THE TRIAL COURT FURTHER ERRED IN FINDING THAT THE PLAINTIFFS WERE READY, WILLING AND ABLE TO CANCEL AND TERMINATE THE AGREEMENT BY AND BETWEEN THE PARTIES.

POINT III: THE UNCONTROVERTED TESTIMONY BY THE PLAINTIFFS SHOWS THAT THEY ENTERED INTO THE CONTRACT WITH DEFENDANT BECAUSE OF THE REPRESENTATIONS BY VAN TASSELL WITH RESPECT TO MRS. BEEBE AND NOT BECAUSE OF THE REPRESENTATIONS AS TO INCOME.

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—vs—

VOYL MECHAM,

*Defendant and Appellant:*

Case No.

10,113

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## APPELLANT'S BRIEF

---

### STATEMENT OF NATURE OF CASE

This is an action by the plaintiffs, Marvin Petersen and Beverly Petersen, for rescision of a warranty deed and reconveyance of realty situated in the State of Wyoming, which was given to the defendant-appellant in exchange for an interest in seller's proceeds from a contract for sale of property in Idaho, based upon certain misrepresentations alleged to have been made by the appellant in order to induce the respondents to enter into the exchange.

## DISPOSITION IN THE LOWER COURT

The case was tried to the Court sitting without a jury, and plaintiffs were awarded judgment, cancelling and rescinding a contract entered into by the plaintiffs and defendant, rescinding a warranty deed given by the plaintiffs to the defendant, and an order was entered against the defendant to reconvey the land in question to the plaintiffs.

## RELIEF SOUGHT ON APPEAL

The appellant appeals from the judgment and decree of the lower court on the ground that the record does not support the Findings of Fact and Conclusions of Law entered therein.

## STATEMENT OF FACTS

On or prior to October 1, 1962, Marvin Petersen and Beverly Petersen, his wife (plaintiffs herein) entered into a Listing Agreement with one Glen Van Tassell who was acting as salesman for Duffin Realty Company, wherein the Petersons authorized Van Tassell to secure a purchaser of their ranch property situated in Wyoming. At the same time, Voyle Mecham (defendant herein) was the contract purchaser of a motel situated in Arco, Idaho.

Sometime prior to December 15, 1962, defendant Mecham entered into a Listing Agreement with Duffin Realty, which authorized Duffin Realty to secure a purchaser of his interest in the motel property in Arco, Idaho. Thereafter, Glen Van Tassell, acting as

salesman for Duffin Realty produced a buyer for the motel owned by defendant Mecham, and on December 15, 1962 defendant Mecham signed an agreement with one Zola B. Beebe, wherein Mrs. Beebe agreed to purchase the said motel. This agreement was introduced in evidence as Exhibit P-1 (R 36). Pursuant to the terms of this agreement Mrs. Beebe agreed to buy Mecham's equity in the said motel in the amount of \$46,096.92, which was payable at the rate of \$300.00 per month, together with interest thereon at the rate of 5% per annum, commencing February 1, 1963. Thereafter, five days later, on December 20, 1962, through the efforts of the same Glen Van Tassell, plaintiffs Marvin and Beverly Petersen and defendant Voyle Mecham entered into an agreement (which was introduced in evidence as Exhibit P-3 (R 40) pursuant to the terms of which defendant Mecham conveyed to the Petersens 59.38% of his equity in the agreement of sale with Mrs. Zola B. Beebe (Exhibit P-1) in exchange for the conveyance of the Petersens' interest in the ranch property situated in the State of Wyoming, which the parties agreed was worth \$27,373.32.

The agreement between Mr. and Mrs. Petersen and Mr. Mecham specified that a copy of the Beebe contract was attached thereto and that Mecham was assigning to the Petersens 59.38% thereof, together with the same percentage of the monthly payments due from Mrs. Beebe, without recourse against Mecham in the event of default by Mrs. Beebe.

In paragraph 6 of the same agreement, Mr. and Mrs. Petersen agreed to hold Mr. Mecham harmless

from the default by Zola B. Beebe of the terms of her agreement of purchase (R 44).

Thereafter, Mrs. Beebe defaulted in her payments required to be made under contract (Exhibit P-1) and on April 8, 1963, Mr. and Mrs. Petersen commenced action for rescission of the agreement entered into between Mr. and Mrs. Petersen and Mr. Mecham and for re-conveyance of the Wyoming ranch property which had been conveyed to Mr. Mecham.

At the trial, Mr. and Mrs. Petersen appeared and testified that Van Tassell had represented to them that the motel was earning an average of \$3,000.00 per month. They further testified that Van Tassell represented to them that he was personally acquainted with Mrs. Beebe (R 76, 88, 89, 90), that she was an honest woman, an able motel manager, and that she would make the payments to the Petersens (R 88). Mrs. Petersen further testified that she and her husband made no effort to check the credit or character of Mrs. Beebe (R 88).

Plaintiffs also produced as a witness Glen Van Tassell, the salesman who had arranged all of the foregoing transactions. He testified, among other things, that Mecham had represented to him that the motel "had made him \$3000.00 per month and that he had books to prove it" (R 32, 33). At the request of Van Tassell, Mr. Mecham delivered his books on the operation of the Arco motel to Mr. Van Tassell. These records were subsequently introduced in evidence as Exhibit D-6 (R 105). The



office girl at the Duffin Realty Company transcribed these records, and her typed copy was introduced in evidence as Exhibit P-4 (R 44 and R 94).

Mr. Mecham also appeared as a witness in his own behalf and among other things denied that he had represented to Mr. Van Tassell or anyone else that the motel had an income of \$3,000 per month. He said, "I told him at one time it took in as much as, a little over \$3,000.00 in one month" (R 78).

The uncontroverted evidence also indicates that Van Tassell was instrumental in procuring the breach of contract by Mrs. Zola B. Beebe (R 104).

The evidence further shows that, subsequent to the breach of the agreement to purchase the motel in Arco, Idaho, by Mrs. Beebe, the holders of underlying liens on the motel proceeded to foreclose their claims against the motel by repossession (R 104) and that the Petersens refused to contribute the sums necessary to save the motel, although Mr. Petersen admitted that he knew that he should have stood together with Mr. Mecham to protect Mecham's equity in the motel but that failed he to do so (R 74).

At the time of the trial hereof the motel in Idaho had been repossessed and the interest of both Petersen and Mecham had been lost thereby.

## STATEMENT OF POINTS

**POINT I: THE TRIAL COURT ERRED IN FINDING "THAT TO INDUCE THE PLAINTIFFS TO ENTER INTO SAID WRITTEN AGREEMENT THE DEFENDANT REPRESENTED [TO PLAINTIFFS] THAT**

DURING THE PERIOD OF TIME HE HAD OPERATED THE MOTEL HE HAD MADE AN AVERAGE NET INCOME OF \$3,000.00 PER MONTH: THAT THIS REPRESENTATION WAS A MATERIAL REPRESENTATION."

POINT II: THE TRIAL COURT FURTHER ERRED IN FINDING THAT THE PLAINTIFFS WERE READY, WILLING AND ABLE TO CANCEL AND TERMINATE THE AGREEMENT BY AND BETWEEN THE PARTIES.

POINT III: THE UNCONTROVERTED TESTIMONY BY THE PLAINTIFFS SHOWS THAT THEY ENTERED INTO THE CONTRACT WITH THE DEFENDANT BECAUSE OF THE REPRESENTATIONS BY VAN TASSELL WITH RESPECT TO MRS. BEEBE AND NOT BECAUSE OF THE REPRESENTATIONS AS TO INCOME.

## ARGUMENT

POINT I. THE TRIAL COURT ERRED IN FINDING "THAT TO INDUCE THE PLAINTIFFS TO ENTER INTO SAID WRITTEN AGREEMENT THE DEFENDANT REPRESENTED [TO PLAINTIFFS] THAT DURING THE PERIOD OF TIME HE HAD OPERATED THE MOTEL HE HAD MADE AN AVERAGE NET INCOME OF \$3,000.00 PER MONTH: THAT THIS REPRESENTATION WAS A MATERIAL REPRESENTATION."

Defendant submits that the Court erred in Finding of Fact No. 3 in two particulars:

- 1) In finding that defendant made any representations at all to plaintiffs; and
- 2) In finding that the alleged misrepresentation was material.

These points will be argued in the above order.

1. THE COURT ERRED IN FINDING THAT DEFENDANT MADE ANY MISREPRESENTATIONS AT ALL TO PLAINTIFFS—In the Findings of Fact signed by the Court, Finding No. 3 contains a finding that “. . . defendant represented that during the period of time he had operated the motel he had made an average net income of \$3,000.00 per month. . . .” (R 15). This finding is vague as to whom defendant made this alleged representation; however, in the Memorandum Decision filed by the trial court in this matter, which was later amplified by the Findings of Fact and Conclusions of Law, the trial judge clearly specified to whom he found the alleged misrepresentations were made. The Memorandum Decision says in part:

“1. That it appears from the clear and convincing evidence that the defendant **HIMSELF** made representations **TO THE PLAINTIFFS** and to others which were false. . . .” (R 14). (Emphasis added.)

The Memorandum Decision further states:

“. . . Whether Van Tassell himself made any false representations, or was an agent of one or the other or both of the parties, would have no bearing in this case” (R 14).

Defendant respectfully submits that the Court's finding that defendant **HIMSELF** made the alleged representations **TO PLAINTIFFS**, finds no support in the evidence. The clear and uncontroverted testimony, even of plaintiffs themselves, was to the con-

trary. Mr. Petersen testified that he did not have any dealings with Mr. Mecham, nor did he talk with Mr. Mecham as to the earnings of the motel (R 65), and both plaintiffs admitted that they had not even met Mr. Mecham until after their contract with him was signed (R 74). Thus, it is clear from the record that the defendant himself did not in fact make any representations to the plaintiffs.

Defendant concurs with the findings of the trial court that whether or not Van Tassell made any false representations would have no bearing in this case. This appears from the fact that Van Tassell was the listing agent for both parties, and thus, his representations are not chargeable to the defendant any more than they are chargeable to plaintiffs.

2. THE COURT ERRED IN FINDING THAT THE ALLEGED MISREPRESENTATION WAS MATERIAL — Defendant, in his testimony and continuously since the inception of this matter, has denied that he made any representation to anyone that the motel had an average net income of \$3,000.00 per month. Since this is a suit in equity, the court has the duty to review both questions of law and fact. RUBEY vs. WOOD, 13 Utah 2d 285, 373 P.2d 386 (1962). Nevertheless, even conceding, for the sake of the argument and without admitting that defendant did make such a representation, defendant asserts that the representation was not actionable since it was not material to the subject of the contract which plaintiffs seek to rescind. It should be borne in mind that plaintiffs were not

purchasing an interest in the motel in Arco, Idaho, nor were they purchasing an interest in the income from the motel. The contracts which were introduced in evidence clearly indicate that on December 15, 1962 defendant sold the motel to MRS. ZOLA BEEBE and that five days later on December 20, 1962, plaintiffs purchased part of defendant's interest in the Beebe contract. Thus the plaintiffs acquired no interest in the motel or its income, but only an account receivable from Mrs. Zola Beebe. The contract between plaintiffs and defendant specifies that the plaintiffs were buying 59.38% of Mecham's "equity in the attached agreement of purchase." The Beebe contract was attached to the agreement between plaintiffs and defendant and by its terms indicated that the only thing moving to the seller thereunder (defendant Mecham) was the right to receive \$300.00 per month from Mrs. Zola Beebe. Accordingly, the property purchased by plaintiffs was merely a portion of the defendant's interest in the contract between defendant and Mrs. Beebe, and not the motel or its income.

One of the fundamental principles of the law relating to misrepresentation and the maintenance of actions based thereon is, that in order to be actionable the facts misrepresented must have been material facts. These facts must substantially affect the interest of the persons asserting the misrepresentation. From the facts of this case it will readily be seen that no facts were misrepresented or even alleged to be misrepresented with respect to the Beebe contract, which was the only thing in which



plaintiffs purchased an interest. "In order to fall within the requisites of materiality essential to predication of fraud on their existence, representations must be **RELEVANT TO THE SUBJECT OF A CONTRACT** and must be as to some **SUBJECT MATERIAL TO THE CONTRACT ITSELF**, as distinguished from matters which are merely collateral thereto and do not constitute essential elements thereof. **FOR EXAMPLE, IT HAS BEEN HELD THAT REPRESENTATIONS WHICH MERELY AFFECT THE PROBABILITY THAT THE CONTRACT WILL BE PERFORMED ARE COLLATERAL TO IT AND DO NOT CONSTITUTE ACTIONABLE FRAUD.**" (23 Am. Jur., Fraud and Deceit, Section 113) Emphasis added.)

Defendant respectfully submits that the statements alleged to have been misrepresented were representations as to collateral matters (the income of the motel during the six months it was operated by Mecham) and were not material to the subject matter of the contract between plaintiffs and defendant (the payments to be received from the Beebe contract).

It is submitted that inasmuch as plaintiffs were purchasing only the right to receive \$178.14 per month from Zola Beebe, the real subject of inquiry by plaintiffs should be the character of Zola Beebe and her disposition for paying her debts. Yet the record shows, from the admissions of plaintiffs themselves, that plaintiffs made no attempt to investigate Zola Beebe and that they relied upon the representations of Van Tassell that **HE WAS PERSONALLY**

ACQUAINTED WITH MRS. BEEBE, THAT SHE WAS AN HONEST WOMAN, AN ABLE MOTEL MANAGER, AND THAT SHE WOULD MAKE THE PAYMENTS TO THE PETERSENS (R 88). There is no hint in the record that any of these representations were made with the knowledge or approval of defendant. In fact, the uncontroverted testimony also shows that defendant was was not personally acquainted with Zola Beebe and did not know her character himself (R 89, 90).

It should also be noted that the precise fact alleged to be misrepresented was that while DEFENDANT operated the motel HE made an average net income of \$3,000.00 per month. This would have no bearing on whatever income might be derived from the motel BY ZOLA BEEBE. Inasmuch as the contract documents (Exhibits P-1 and P-3) on their face indicated that Mrs. Beebe had purchased the motel from Mr. Mecham only five (5) days prior to the time that plaintiffs purchased their interest in the Beebe Contract from Mr. Mecham, plaintiffs were charged with the knowledge that Mrs. Beebe was a new operator of this motel and they would have no right to rely on any representations made to them with respect to the operation of the motel by defendant or anyone else, other than Mrs. Zola Beebe.

In the case of LEWIS v. WHITE, 2 Utah 2d 101, 269 P.2d 865 (1954), this court held:

**“No matter how naive or inexperienced the defendants were, they could not close their eyes and**

accept unquestioningly any representations made to them. **IT WAS THEIR DUTY TO MAKE SUCH INVESTIGATION AND INQUIRY** as reasonable care under the circumstances would dictate. . . ." (Emphasis added).

Yet the record clearly indicates that plaintiffs made no attempt to investigate the one element of importance to them, which was Van Tassell's representation that Mrs. Beebe was a good motel operator, an honest woman, and that she would pay the Petersens.

**POINT:II THE TRIAL COURT FURTHER ERRED IN FINDING THAT THE PLAINTIFFS WERE READY, WILLING AND ABLE TO CANCEL AND TERMINATE THE AGREEMENT BY AND BETWEEN THE PARTIES.**

There is no evidence in the record to support that portion of Finding of Fact No. 3 which states that "the plaintiffs of all times have been ready, willing and able to cancel and terminate said written agreement by and between the parties, terminating any interest they may have acquired therein and **RETURNING THE SAME TO DEFENDANT**" (R 16). (Emphasis added.) In fact, the record shows that the Petersens did not attempt to protect the interest they had acquired from Mecham in the Beebe Contract and simply let it go. Thus, the Petersens had nothing to return to Mecham, and the trial court was in error for including this in Finding of Fact No. 3. Petersen admitted that he knew that they should stand together to protect Mecham's equity in the motel, but failed to do. (R 74). Under general prin-



cipals of equity he who seeks equity must do equity. In a suit for rescission of a completed contract, plaintiff must restore defendant to his status quo. The uncontroverted evidence shows plaintiffs failed to protect the interest they should have restored to defendant, and consequently were not in the position to do equity by their own default. Accordingly the court should have denied plaintiffs' petition for rescission.

**POINT III: THE UNCONTROVERTED TESTIMONY BY THE PLAINTIFFS SHOWS THAT THEY ENTERED INTO THE CONTRACT WITH THE DEFENDANT BECAUSE OF THE REPRESENTATIONS BY VAN TASSELL WITH RESPECT TO MRS. BEEBE AND NOT BECAUSE OF THE REPRESENTATIONS AS TO INCOME.**

Notwithstanding any representations made to the Petersens with respect to the income of the motel while Mecham operated it, the record shows that the real basis for the Petersens' entering into the contract was the representation by Van Tassell to the Petersens as to the character of Mrs. Zola Beebe and her ability to operate and manage the motel in a profitable manner. Mr. Van Tassell had been negotiating with the Petersens for two months or more to get them to buy the motel (R 73, 88). It was at this time that the alleged representations as to the income were made to them. Yet they did not buy the motel. Thereafter, Zola Beebe bought the motel, and Mrs. Petersen testified that Van Tassell made representations to them of his prior acquaintance with Mrs. Beebe, together with her ability and

honesty, whereupon the Petersens bought an interest in the Beebe Contract. Thus it clearly appears that the fact which motivated the Petersens to "deal" was Van Tassell's representations about Zola Beebe, and not about the income of the motel. In fact Mrs. Petersen admitted this in so many words in the following testimony (R 89):

**"Q. He [Van Tassell] did assure you you would be paid by Mrs. Beebe every month?**

**"A. I guess he did, or we wouldn't have signed it."**

## CONCLUSION

Appellant respectfully submits that essential elements of the trial court's Findings of Fact and Conclusions of Law are contrary to the evidence, are not supported by any competence evidenced and, therefore, the judgment in favor of the plaintiffs should be reversed in favor of the defendant.

**Respectfully submitted,**

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